

SEATTLE INDIAN CENTER

v.

ACTING DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS (OPERATIONS)

IBIA 83-37-A

Decided December 5, 1983

Appeal from denial of fiscal year 1983 funding under the Indian Child Welfare Act.

Vacated and remanded.

1. Administrative Procedure: Burden of Proof

When the Bureau of Indian Affairs seeks a determination that a prior decision of the Board of Indian Appeals is erroneous and should be overruled, it bears the burden of proving the error.

2. Indian Child Welfare Act of 1978--Financial Grant Applications:
Generally

If there is no duplication of service population between a tribe providing services under the Indian Child Welfare Act and an independent organization providing the same types of services, the mere fact that the organization is located in an area designated "near reservation" by the tribe does not render it ineligible to seek grant funds.

3. Indian Child Welfare Act of 1978: Financial Grant Applications:
Generally

When more than one otherwise eligible grant applicant applies for funds under the Indian Child Welfare Act

to provide services to the same Indian population, funding should be given only to the organization whose proposal best promotes the purposes of the Act.

APPEARANCES: Moshe Judah Genauer, Esq., and Janice M. D'Amato, Esq., Seattle, Washington, for appellant; Penny Coleman, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for appellee. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

On July 7, 1983, the Board of Indian Appeals (Board) received a notice of appeal from the Seattle Indian Center (appellant) seeking review of the May 16, 1983, decision of the Acting Deputy Assistant Secretary--Indian Affairs (Operations) (appellee) which denied appellant fiscal year 1983 funding under the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1931-1934 (Supp. II 1978). For the reasons discussed below, the Board vacates the decision and remands the case to the Bureau of Indian Affairs (BIA) for further action.

Background

Appellant is a multi-service Indian organization serving a largely urban Indian population in the Seattle/King County area of Washington State. It has operated family service programs since its inception in 1972 and for the last 5 years has received funding under the ICWA. Its programs include a

foster care and adoption program which provides service to approximately 3,500 Indians living in King County. Appellant's total client population includes 6,253 Indians living within the Seattle city limits, and 12,437 Indians living in King County (Appellant's Opening Brief at 2-5).

On January 27, 1983, appellant submitted a proposal to the Portland Area Office, BIA, for fiscal year 1983 funding under the ICWA. The application was denied by the Area Director on February 18, 1983, on grounds that appellant was not an eligible applicant because it was located in an area designated "on or near" reservation, and its application did not comport with regulations in 25 CFR Part 23 governing ICWA grant applications. Appellant appealed the Area Director's decision to the Deputy Assistant Secretary on March 25 1983.

On May 16, 1983, the Acting Deputy Assistant Secretary affirmed the Area Director's decision, stating that appellant's service area, Seattle/King County, had been designated a "near reservation" area by the Puyallup Tribe. Consequently, the decision found that appellant was not an eligible grant applicant because 25 CFR 23.25(c) and 23.26(a) provide that under these circumstances, the Puyallup Tribe was the only proper grant applicant for the Seattle area.

On June 28, 1983, appellant filed a notice of appeal with the Board from the May 16, 1983, decision. After receipt of the administrative record, the appeal was docketed on August 16, 1983. An expedited briefing schedule

was established on August 30, 1983, at appellant's request. Briefing was concluded on October 20, 1983.

Discussion and Conclusions

In United Indians of All Tribes Foundation v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 226, modified upon reconsideration, 11 IBIA 276, 280, 90 I.D. 376, 378 (1983) (United Indians), the Board stated:

[A] finding that an Indian organization providing ICWA services is located in an area designated "near reservation" may suggest the organization provides services that duplicate services furnished by a tribe. However, the law does not provide that location alone determines whether a program is properly characterized as "off" or "near" reservation. The BIA must instead ascertain whether the client population of the program, in fact, duplicates the population for which the tribe would ordinarily be expected to provide services.

This decision thus held that the mere fact that an Indian organization providing ICWA services is located in an area designated "near reservation" by a tribe does not render that organization ineligible to be an independent grant applicant.

The facts of this case show, and both parties agree, that it falls within the Board's holding in United Indians. Appellant is an organization not affiliated with any tribal government and provides ICWA services to an Indian population in the urban Seattle/King County area. Although it is located in an area designated "near reservation" by the Puyallup Tribe, see

44 FR 2693 (Jan. 12, 1979), 1/ it states that it serves an Indian population of approximately 18,700 Indians, less than 3 percent of whom are members of the three closest tribes, the Puyallup, Muckleshoot, and Suquamish. The holding in United Indians would, therefore, preclude a finding that appellant here was ineligible to be an independent applicant for ICWA funding merely because it was located in an area designated "near reservation." 2/

Appellee, in an attempt to avoid having United Indians control the disposition of the present case, "requests that the Board reconsider its findings in [United Indians] through this appeal" (Appellee's Answer Brief at 1).

Regulations in 43 CFR 4.315 govern reconsideration by the Board:

(a) Reconsideration of a decision of the Board will be granted only in extraordinary circumstances. Any party to the decision may petition for reconsideration. The petition must be filed with the Board within 30 days from receipt of the decision and shall contain a detailed statement of the reasons why reconsideration should be granted.

(b) A party may file only one petition for reconsideration.

1/ Appellee states that King County has also been designated "near reservation" by the Muckleshoot and Suquamish Tribes. See Appellee's Answer Brief at 2 n.1. As of July 5, 1983, when the first decision in United Indians was issued, the Muckleshoot and Suquamish Tribes had each proposed King County as a "near reservation" area, but the designation had not been published in the Federal Register. Appellee does not give a citation for such publication between July 5 and the date of its brief. Appellant states that neither of these tribes has designated Seattle as a "near reservation" area. See Appellant's Opening Brief at 9.

2/ Appellee contended in United Indians and in the present case that organizations located in areas designated "near reservation" were required by 25 CFR 23.25(c) and 23.26(a) to seek funding through a subgrant from the tribe or tribes making the designation.

The Board notes that appellee sought and was granted reconsideration of the initial decision in United Indians. Perhaps interpreting the one petition rule of 43 CFR 4.315(b), appellee did not seek reconsideration of the second United Indians decision.

The Board has not previously construed the one petition rule, and does not do so now. The intent of that rule is to prevent the filing of successive petitions for reconsideration of the same decision. An argument could be made that the rule should not be construed to limit the filing of a petition for reconsideration of an opinion issued upon reconsideration when the second opinion decides issues not reached in the first opinion.

[1] In any case, appellee did not petition for reconsideration of the second decision. Neither did appellee pursue any alternative course of action in an attempt to alter the decision. The Board, therefore, declines to "reconsider" its second decision in United Indians. If appellee is dissatisfied with that decision, it bears the burden of showing why the decision was legally incorrect and should be overruled. See 5 U.S.C. § 556(d) (1976).

Appellee first argues that United Indians was based upon a misunderstanding of the way in which BIA administers the ICWA grant program ^{3/} in

^{3/} The ICWA program is relatively new and the procedures for equitably administering it and dispensing the limited appropriations are still being refined. The Board acknowledges that its understanding of the problems encountered in the operation of the grant program comes only from information presented in the context of specific appeals. It further acknowledges

that one procedure which the Board suggested could be followed in calculating a tribe's service population for the determination of maximum funding levels is already being used. Thus, appellee argues that the tribe, not BIA, determines the extent of its service area. Although a tribe may have designated a particular area as "near reservation," appellee states that the tribe is not required to service an area larger than it wishes. This may result in the claimed service area for ICWA purposes being smaller than the area designated "near reservation." The corollary of this is appellee's assertion that the tribe may claim as its service population the entire "near-reservation" area, or presumably an area of any other size, if a subgrant to an organization providing services to the entire area is made by the tribe.

Appellant responds that it is irrelevant to this case whether or not the present regulations theoretically permit the inclusion of all of an area designated "near reservation" within a particular tribe's service population because appellee's own exhibit shows that none of the three tribes in the area included the Indian population of Seattle or urban King County in their requests for funding.

4/ By using location within a "near reservation" area as the sole criterion for determining whether an organization is eligible

fn. 3 (continued)

that it is not omniscient and cannot anticipate every possible permutation that might arise because of overlapping populations and programs.

Information on the actual operation of this and all other BIA programs and actions is within the control of BIA. Such information should be available to BIA's attorneys in the Office of the Solicitor. The Board renders its decisions based upon the factual data presented in the administrative record and the briefs of the parties, unless an evidentiary hearing is held. It is thus the primary responsibility of BIA and the Solicitor's Office to ensure that all relevant information is presented to the Board. The Board cannot issue a decision upon information not in the record. See 43 CFR 4.24.

4/ Appellant refers to exhibit 1 attached to Appellee's Answer Brief.

to apply independently for an ICWA grant, appellant contends that BIA is excluding the entire urban Indian population in and around Seattle from the ICWA program.

The Board agrees with appellant. The three tribes in this area clearly chose to provide services only to their tribal members residing within the area designated as "near reservation," and sought ICWA grants based upon that population. Neither did the tribes indicate they desired to administer subgrants to other organizations that might provide ICWA services to urban Indians of other tribes not otherwise covered by tribal programs.

Consequently, some Indians residing in an area designated "near reservation" are not being served by the tribe making the designation or through a subgrant from that tribe. If it were held that no other organization located in the "near reservation" area is eligible to apply independently for a grant, those individuals living in a "near reservation" area, but not covered by a tribal program, would be excluded from the benefit of funds appropriated by Congress on their behalf.

Appellee next argues that the Board has improperly restricted eligibility for ICWA grants by holding that service population is the determinative factor rather than programs provided. Thus, appellee contends, two organizations could serve exactly the same client population as long as they provided different services. ^{5/} Appellee states that "duplication of

^{5/} An example of this might be one organization which provides foster care and adoption services not provided by another organization which exclusively provides family counseling.

services is not a factor in determining who can apply for a grant but rather a factor in determining whether the grant proposal best promotes the purposes of the [ICWA]. * * * Therefore, a tribe and an organization can have the exact same client population and both can be funded if they are not duplicating services" (Appellee's Answer Brief at 7).

Appellant replies that in this argument "Appellee apparently concedes that it should not be necessary for an applicant serving the same geographical area as a tribe to subgrant through a tribe as long as no duplication of services exists. Thus, the BIA decision here was incorrect. * * * Based upon Appellee's own argument, the eligibility of all applicants for ICWA funds should be based upon the need for the services they provide and not upon the artificial geographic criteria of service area or 'near reservation' areas" (Appellant's Reply Brief at 3).

The Board considered in Navajo Tribe v. Commissioner of Indian Affairs, 10 IBIA 78, 89 I.D. 424 (1982), the question whether two organizations providing ICWA services to the same or essentially the same client population could be independently eligible grant applicants. In that case, an organization which was located in an area designated "near reservation" by the Navajo Tribe, and which sought to provide services to essentially the same client population as the tribe, was held not to be independently eligible to apply for ICWA funds. The question whether the organization would have been eligible if it were providing services not duplicated by the tribe was not raised or considered. 6/

6/ Board decisions are based upon the facts of that particular case. While generalizations of legal principles are normally possible and appropriate

Appellee's argument raises for the first time in a case before the Board the potential that more than one organization may be funded to provide services to the same client population. The Board must again agree with appellant that appellee's argument itself shows the error of the decision in this case. If more than one organization can provide services to the same population as long as the types of services are not duplicated, BIA must necessarily examine the programs proposed by all organizations within an area to determine whether there is duplication. The exclusion of some organizations at the outset based on the mere fact of their location would prevent a reasoned analysis of whether services were being duplicated. ^{7/}

[2, 3] Based upon the information provided in this case, the Board affirms and extends its prior decisions concerning eligibility for ICWA

fn. 6 (continued)

in analyzing Board decisions, different factual situations not considered in a case may change the result.

^{7/} Appellee's arguments in this case demonstrate confusion between ICWA programs and entities eligible to apply for ICWA funding. Eligible entities are defined by 25 CFR 23.21 (a) as any Indian tribe or tribes or any off-reservation Indian organization, including multi-service Indian centers. The Board's decision in United Indians applies in the decision of whether a particular entity is eligible to apply independently for ICWA funding by holding that the client population to be served by the entity, rather than the entity's geographic location, is determinative. This decision thus requires that, when the client population of an applicant for ICWA funding does not duplicate the client population served by a tribal program, the applicant must be treated as an off-reservation Indian organization, even though it may be located in an area designated "near reservation." In these cases, the applications must comply with 25 CFR 23.26(b) and 23.28(b) or (c).

Appellee's second argument presented here, that two or more entities can provide services to the same client population as long as the services provided are different, goes to the question of the nature of the programs offered. As mentioned, supra, the Board has not previously considered this question. The nature of the services offered by an ICWA recipient is irrelevant to the question of whether funding for the program is properly sought under the off-reservation or "on or near" reservation regulations.

grant funding. When funding is sought by an organization located in an area designated "near reservation" by a tribe or tribes, the BIA must ascertain whether or not the organization intends to provide services for a population already covered by a tribal ICWA program or a tribal subgrant. If there is no duplication of population, the organization should be found to be an eligible grant applicant and should be considered for funding under the "off-reservation" procedures established pursuant to 25 U.S.C. § 1932 (Supp. II 1978). United Indians, supra. If there is a duplication of population in applications from two or more organizations, BIA must determine whether there is also a duplication of services. From the information presented by appellee in this case, if there is a duplication of services to the same population, and absent other disqualifying factors, each organization should still be found to be an eligible applicant, but funding should be given only to the organization whose proposal best promotes the purposes of the ICWA.

Finally, appellee states that because BIA "recognize[d] the administrative difficulties Seattle organizations may have by subgranting with local tribes, the BIA proposed regulations to allow organizations located in near reservation areas, which serve a majority of clientele who are not members of or affiliated with tribes designating the near reservation area, to apply as individual applicants. Final promulgation of the amended regulations is not expected prior to processing of the 1984 ICWA application" (Appellee's Answer Brief at 3-4). 8/ Appellee concludes "that until the proposed amendments to the ICWA regulations are finalized, an organization

8/ Again, appellee does not furnish a citation for Federal Register publication of these proposed regulations.

located in a near reservation area must subgrant for ICWA funds through a tribal governing body."

Id. at 7.

This argument assumes that the current regulations require subgranting by any organization located in a "near reservation" area. As previously discussed, the Board has held that this is not correct. The BIA's proposed effort to clarify its regulations and to incorporate previous administrative rulings, however, is desirable and will benefit all persons concerned with the administration of the ICWA program. 9/

9/ Appellant contends that Seattle and urban King County were not designated "near reservation" areas by any of the three tribes in the area, and that, furthermore, the area could not be so designated under the Supreme Court's holding in Morton v. Ruiz, 415 U.S. 199 (1974), and Departmental regulations establishing the designation system. Appellant first argues that an examination of the tribal resolutions concerning designation of "near reservation" areas clearly shows that the tribes did not intend to designate the urban areas in and around Seattle as "near reservation." Appellant states that none of the tribes listed Seattle as part of their designations. The record in this case and in United Indians indicates that Seattle is located in King County. The Board is not aware of the local political structure of the State of Washington, but takes official notice of the fact that, in some states, cities can be separate political entities from the county in which they are located. To the extent that appellant's arguments raise a question of whether the Federal Register publication of "near reservation" areas affecting Seattle may be in error, the Board suggests that BIA review those designations and determine whether any correction should be made.

Appellant further argues that Morton v. Ruiz, supra, and 25 CFR 20.1(r), which defines "near reservation," both indicate that a near reservation" area must be adjacent or contiguous to the reservation and there must be social, cultural, and economic affiliation between the Indians living in the "near reservation" area and the reservation. Appellant alleges that neither of these conditions is met in the Seattle area. In the first United Indians decision, the Board held that even assuming it had jurisdiction to review a "near reservation" designation and that the appellant had standing to take an appeal from that designation, there was no indication that a proper and timely appeal had been taken. The Board held that it would not permit a collateral attack on the designations in the context of an appeal from a denial of ICWA grant funding. See 11 IBIA at 233. Likewise, the Board will not address the merits of this argument in the present appeal. However, inasmuch as the argument raises serious concerns about the designation process, BIA may wish to consider the matter further.

Therefore, the Board finds that appellee has failed to show that the decision in United Indians was erroneous and should be overruled. Accordingly, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the May 16, 1983, decision appealed from is vacated and the case is remanded to the Bureau of Indian Affairs for consideration of appellant's application for ICWA funds in accordance with this opinion.

Jerry Muskrat
Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

Bernard V. Parrette
Chief Administrative Judge